

TERRAMAR RETAIL CENTERS,)	No. 62671-0-I
LLC, a Delaware limited liability)	
company,)	
)	
Respondent,)	
)	
v.)	
)	
WILLIAM B. HALL and MICHELLE R.)	
HALL, husband and wife and the)	
marital community comprised thereof;)	
ROBERT D. SYPOLE and LAURA)	
BOYCE-SYPOLE, husband and wife)	
and the marital community comprised)	
thereof; DREAM QUEENS, INC., a)	
Washington corporation,)	UNPUBLISHED OPINION
)	
Appellants.)	FILED: August 24, 2009
)	

BACKGROUND

Terramar Retail Center, LLC (Terramar) owns the Covington Square Shopping

Center. In January 2004, Terramar's predecessor entered into a lease with Dream Queens, Inc. (Dream Queens), a franchisee of Dream Dinners, Inc. The lease was to expire in May 2009 and was guaranteed by Dream Queens' owner Laura Sypole, her then business partner, and their spouses. Dream Queens operated a retail store where customers utilized professional kitchen equipment to prepare meals.

Beginning in the summer or fall of 2007, Dream Queens was unable to pay its rent. The company ceased operations on October 31, 2007 and surrendered the premises on November 15, 2007.

Before quitting the premises, Sypole was contacted by Stacy Gavino, who was interested in subletting the space or taking over the lease for her business called Cherishing Moments. Gavino planned to operate a wedding planning and consulting business and to rent out the kitchen facilities to small caterers by the hour. Gavino said she was willing to pay up to \$34 per square foot for the property. Dream Queens had been paying only about \$12.50 per square foot.

Sypole told Terramar's senior vice president Pamela Aguirre about the Cherishing Moments prospect on November 2, 2007. Aguirre said Terramar would have to review any replacement tenant "on paper" to ensure that it would be a good fit for the tenant mix at Covington Square. Aguirre promised to send Sypole an assignment package to pass along to Gavino, but never did so.

When Sypole met with Terramar's attorney on November 8, he gave her a lease termination agreement and a confession of judgment, which Sypole declined to sign. The attorney explained that he had advised Aguirre not to send an assignment

package because Dream Queens was in breach of the lease and there was therefore nothing to assign. The attorney advised Sypole to have Gavino contact Aguirre directly.

Gavino left several messages for Aguirre, but was unable to speak with her. Gavino did not attempt to contact Terramar's broker and never submitted an application to lease the space. After receiving no response from Aguirre, Gavino lost interest in the space and decided to look elsewhere. In the end, Gavino never leased any space.

On November 30, 2007, Terramar's attorney sent Dream Queens' counsel formal notice of termination of the lease and filed a summons and complaint.

The court granted Terramar's motion for summary judgment and awarded it costs and fees. Dream Queens appeals.

DISCUSSION

The usual standard of review for summary judgment applies.¹

Dream Queens does not dispute that it breached the lease. It argues only that questions of fact exist as to Terramar's reasonable mitigation of its damages.

"The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts."² The party whose wrongful conduct caused the damages has the

¹ We review summary judgment decisions de novo, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

² Cobb v. Snohomish County, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997).

burden of proving the failure to mitigate.³

Dream Queens contends Terramar could be found to have acted unreasonably because it refused to allow Dream Queens to assign its lease to Cherishing Moments, refused to consider Cherishing Moments as a replacement tenant, and failed to reduce the listed price of the space when the economy began to decline. We agree with the trial court that these arguments do not create a triable question of fact.

First, Dream Queens presented no evidence that Cherishing Moments was ever a serious candidate as a replacement tenant. It is undisputed that Cherishing Moments never submitted an application, written proposal, or any other form of correspondence for Terramar's consideration. Gavino testified she gave up on the space after her three messages were unreturned. She testified that she when she learned that Terramar was suing Dream Queens for breach, "we just decided, okay, this obviously isn't the route we want to go if they're being so difficult with her."⁴

Further, Dream Queens cannot show that Terramar was unreasonable in refusing to consider an assignment. The lease provides that consent to an assignment will not unreasonably be withheld, but explicitly states that a refusal to consent is not unreasonable when the tenant is already in default. Dream Queens was already in default when Sypole first proposed an assignment on November 2, 2007. Terramar's refusal to consider it cannot be considered unreasonable.⁵

³ Id.

⁴ Clerk's Papers at 403.

⁵ Dream Queens denies that it was in default when it proposed the assignment, but provides no evidence to refute Engelhard's statement.

Further, even if Terramar might have mitigated its damages by accepting Cherishing Moments as a tenant, Dream Queens must demonstrate that the efforts Terramar did make to mitigate its damages were not reasonable. “If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.”⁶

When Dream Queens quit the property, Terramar immediately put up a sign on the space advertising it for lease, and placed a large sign on the street stating, “for leasing information inquire with Kidder Matthews,”⁷ and providing contact information for Terramar’s broker. Terramar advertised the space on its website and in its brochures, and marketed the property through the International Council of Shopping Centers and during conventions. Terramar’s real estate broker advertised the property through his brokerage and shopping center networks and produced a brochure listing the property. The rent was priced below the market rate at \$21 per square foot in an effort to find a replacement. The price was \$4 per square foot less than any other commercial space of similar size in Covington. At the time of the summary judgment motion, Terramar’s broker had discussed the space with “no fewer than six prospects, and [had] been unable to get any of them to seriously consider the Premises.”⁸

Dream Queens does not contend these efforts were unreasonable except to argue that Terramar should have reduced the rental rate when the economy began to

⁶ Cobb, 86 Wn. App. at 230 (quoting Hogland v. Klein, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956)).

⁷ Clerk’s Papers at 385.

⁸ Id. at 395.

decline. But Dream Queens provided no evidence to support this argument, which its own witness undermined. Commercial real estate broker Brian Pounder testified he was “very familiar with the commercial lease market existing in Covington, and Southeast King County, at any given time,”⁹ but he did not suggest that the market was in decline, that \$21 per square foot was unreasonable in those circumstances, or that a lower price would have secured a replacement sooner. Instead, Pounder stated that “Terramar undoubtedly could re-lease the Dream Queens space”¹⁰ at the listed price.

Because Dream Queens failed to present any evidence that Terramar's efforts to re-lease the property were unreasonable, summary judgment was appropriate.

We affirm the trial court and award Terramar its reasonable attorney fees on appeal upon compliance with RAP 18.1.

Edington, J

WE CONCUR:

Cox, J.

Ajid, J.

⁹ Id. at 104.

¹⁰ Id. at 105.